UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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23 January 2012

Dr. Roy Crabtree,
Regional Administrator,
Southeast Regional Office,
National Oceanic and Atmospheric Administration,
263 13th Avenue South, St. Petersburg, FL 33701-5505,

Subject: Amendment 18A to the Fishery Management Plan for the Snapper Grouper Fishery of the South Atlantic Region and Environmental Impact Statement with Regulatory Flexibility Act Analysis, Regulatory Impact Review, and Fishery Impact Statement Draft Environmental Impact Statement (DEIS). CEQ# 20110414. ERP Number: NOA-E91032-00

Dear Dr. Crabtree:

Pursuant to our responsibilities under the Clean Air Act (CAA) § 309 and National Environmental Policy Act (NEPA) § 102(2)(C), the U.S. Environmental Protection Agency (EPA), has reviewed the above-referenced DEIS. EPA reviewed this DEIS in context of our environmental authorities and responsibilities as delegated by Congress under the CAA. , *Lack of Objections* (see enclosed rating system) and gives it a *Lack of Objections* (see enclosed rating system). This rating reflects EPA's belief there is no conflict between the proposed action and any of EPA's environmental statutes and implementing regulations.

Background:

The proposed action is focused solely on one fish: the black sea bass (BSB) and consists of 12 management actions. These actions involve establishing acceptable biological limits (Action 1a), changing annual catch limits (Action 1b - d), creating an endorsement program (EP) (Action 2), an EP appeal process (Action 3), and EP transferability rights (Action 4), establishing fishing pot limits (Action 5), reducing by catch (Action 6), creating a spawning season closure (Action 7) and commercial trip limits (Action 8), modifying size limits (Action 9), and improving data collection (Actions 11 & 12) for fishery management purposes.

The specified need is to reduce overcapacity and the overharvesting of the BSB. The most recent fishery data indicate the BSB population is still experiencing overfishing to a small extent, but is no longer considered to be *overfished* while not yet being fully *rebuilt*. The DEIS included alternative analyses for each of the proposed 12 Actions.

EPA comments:

EPA, as the Council of Environmental Quality-delegated NEPA review agency, offers its enclosed recommendations for NOAA's consideration when preparing its final EIS (FEIS) so it may better meet NEPA's mandate.

The DEIS appears to lack 1) a clearly defined need statement which is consistent with the proposed actions, 2) sufficient background and context to adequately understand the basis for the 12 actions, how they meet the specified need, and their resulting impacts to the BSB, its associated environment and ecosystem, 3) confusing and inconsistent statements, and 4) an incomplete alternative and cumulative effects analyses, and 5) the BSB's unique lifestyle characteristics appear to be insufficiently considered in the Action Alternative analyses. Last and most importantly, the DEIS is simply too technical for non-NOAA fishery scientists' comprehension and consequently most unlikely to be comprehended by the fishermen who are most affected by the proposed actions. Adequately informing the public, particularly the affected public – the fishermen, is central to NEPA's mandate.

Two enclosures are provided with this letter. One is a copy of EPA's rating system. The other contains additional details regarding EPA's above identified issues with achieving NEPA's mandate. Thank you for the opportunity to review and provided comments. If you wish to discuss this matter further, please contact Beth Walls (404-562-8309 or walls.beth@epagov) of my staff.

Sincerely,

Heinz J. Mueller, Chief
NEPA Program Office
Office of Policy and Management

Enclosures: 2

EPA's Detailed Comments on FMP Amendment 18A

(January 23, 2012)

NEPA requires agencies at a minimum to: support its conclusions with studies that the agency deems reliable, explain its conclusions drawn from its methodology, and the reasons it considered the underlying evidence to be reliable.[1] Moreover, statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses.[2]

The Need Statement Appears Unclear and Inconsistent with the Proposed Actions.

In the DEIS' Executive Summary, the stated need is. *Because of previous Amendments to the Snapper-Grouper FMP imposing strict harvest limits, these fishermen may now focus on BSB. For example, the BSB commercial quota was met in 2009 and 2010 before the most productive fishing season (Nov. – February).*

The above statement suggests the fishing focus may now be on BSB since previous fishery management actions have restricted harvest on snapper and groupers. However, in § 1.3, the identified *need for action in Amendment 18A is to reduce overcapacity and reduce the rate of harvest in the black sea bass pot component of the snapper grouper fishery.*

The above statement is not really clear as to how NOAA defines *overcapacity* nor has it been defined in the DEIS. Regardless, the above statement seems to suggest the need for the proposed actions is to reduce current over fishing of black sea bass (BSB), which appears different that the identified need in the executive summary – to protect the BSB from snapper/grouper fishermen targeting BSB as a response to stricter snapper/grouper regulations.

> **EPA recommends** the FEIS clarify the need for the proposed actions. For example, is the actual need to facilitate BSB-population numbers to meet spawning maximum yield by the end of May 31, 2016 by reducing the number of BSB being removed from the population too quickly? Or, is the actual need to allow maximum fishing opportunity and effort and potentially meet spawning maximum yield by the end of May 31, 2016?

If the need for the proposed action is to reduce fishing of the BSB, it does not appear to be supported by the proposed actions' analyses. For example, both Actions 1a and 1b appear focused on maximizing fishing opportunity of the BSB and potentially meeting the May 2016 regulatory deadline. Action 1a's preferred alternative allows the greatest harvest while still achieving an estimated 50% probability of meeting the 2016 *rebuild* deadline. Similarly, Action

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[1] 42 U.S.C. § 4332(2)(C) (G) Make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment; 40 CFR § 1500.1 (b)

[2] 40 CFR § 1502.1

1b's preferred alternative is expected to result in the greatest increase in BSB allowable harvest over time while potentially allowing the stock to rebuild.

> **EPA recommends** the FEIS' need statement explain why the status quo is not working. An explanation of why the status quo is not working can go far to explain the need for the proposed actions being considered and the proposed actions themselves.

Sufficient Background and Context to Adequately Understand the Basis for the Proposed Actions

EPA recommends the FEIS improve upon the DEIS clarity especially for the affected public's ability to understand why NOAA is taking the proposed actions.

- The DEIS is very difficult to understand because the necessary context and background information is lacking. For example under the Action 1a alternatives discussion,
  - The technical use of common words, "catch" and "harvest" are unclear. Can it be assumed the harvest rate is the catch level?
  - Because the DEIS is unclear how *catch level* translates into *mortality rate*, it is difficult to understand the differences between the given alternatives. For example, alternative 3's analysis is in terms of establishing different mortality rates while alternative 2 appears to be focused on catch levels not mortality rates. According to the NEPA regulations, substantial treatment should be devoted to each alternative in detail so reviewers may evaluate the alternatives comparative merits.[3]

    EPA recommends the FEIS should clarify how these two alternatives can be meaningfully compared.

- The actions as described in the DEIS do not appear to inform how they will help meet the identified need for proposed amendment.

- Action 1a-Alternative #3 – because a preferred alternative appears to be selected when the actual data appears to be pending as indicated by Table S-1a, the proposed action appears to be premature until an actual "F" value specified and the *rebuild project* completed.

  EPA recommends the FEIS should clarify how the preferred alternative was selected.

- Action 1a-Alternative #3 – the text on p. S-6 appears to be inconsistent with Table S-1a. On p. S-6, the text states the preferred alternative has a greater than 50 percent probability; however the text in Table S-1a indicates only a 50% probability.

  EPA recommends the FEIS clarify this inconsistency.

[3] 40 CFR § 1502.14 (b)

- Action 1a - Alternatives #3 & 4 – the DEIS indicates the socioeconomic impacts are potentially greater under Alternative 3 and 4. However it is unclear what the actual differences are between the two alternatives.

  EPA recommends the FEIS clarify the differences between these two alternatives.

- Action 1b – Alternatives #1 & #2 – the DEIS does not adequately differentiate the differences between these two alternatives. Both set the *annual catch limit* (ACL) equal to the *acceptable biological catch* (ABC) and both are subject to Amendment-13 established commercial and recreational allocations.

  EPA recommends the FEIS clarify the differences between these two alternatives.

- Action 1a-Alternatives #3 & 4 – in the DEIS, the preferred Action-1b alternative provides no buffer between the ABC and the ACL while two other alternatives provided a buffer. The buffer appears to provide a safety margin to prevent overfishing. The DEIS indicated no buffer was necessary because scientific uncertainty from the 2011 SEDAR 25 assessment was incorporated into the preferred alternative. Alternatives #3 & 4 provided buffers of 10 and 20 percent, respectively, and these alternatives were also based on same the SEDAR assessment used in the preferred alternative.

  EPA recommends the FEIS should discuss why NOAA prefers to estimate the unknowable versus using a specified percent buffer. The discussion should include the pros and cons of each approach. NEPA mandates agencies explain their chosen methodology and compare the alternatives in a comprehensive manner.

  EPA recommends the FEIS should define OFL when it is first used, i.e., on p. S-7. OFL is used subsequently on pages 12, 82, and 83 before it is finally defined as the *overfishing limit* on page 92.

- Action 1a-Alternatives #3 & 4 – Table S-2 compares Action 1b alternatives based upon the preferred Action 1a alternative instead of the other Action 1b alternatives. The DEIS is unclear on the relationship between the Action 1a and 1b alternatives nor why all Action 1a alternatives were analyzed in context of all Action 1b alternatives.

  EPA recommends the FEIS should clarify this relationship and explain why only the preferred Action 1a alternative was evaluated in context of all the Action 1b alternatives. If the selection of an Action 1a alternative has a cumulative effect with an Action 1b alternative, these cumulative effects should be discussed and compared amongst the different Action 1a and 1b alternatives.

- Action 1c and 1d – according to the DEIS, the preferred Action 1c alternative is *no action* where no *annual catch target* (ACT) is set for the commercial BSB sector fishery. In contrast, the preferred Action 1d alternative is to set an annual catch target for the recreational sector. It appears from the DEIS of the four Action 1d alternatives, the most restrictive target is established for the recreational sector to realize the greatest reduction in recreational harvest. The DEIS does not explain why an ACT is needed for the recreational sector but not for the commercial sector. It may seem counterintuitive for the recreational sector to receive stringent targets and the commercial sector to have none. It is logical to assume commercial fishermen may place greater potential for overfishing then the casual recreational fisherman. Moreover, the DEIS indicate far fewer individuals fish pots than possess commercial permits (see pp. S-12, 20).

  EPA recommends the FEIS should explain the need to impose the greatest harvest reduction measures on the recreational sector but no harvest reduction measures for the commercial sector. Since the recreational sector also supports small businesses and jobs (a form of commercial enterprise), it may appear in the DEIS that NOAA is selecting one commercial enterprise over another without adequate justification (i.e., environmental information).

- Action 1a and Action 1d – it is unclear why the "significant uncertainty" assumptions associated with the 2011 SEDAR 25 data are sufficient to eliminate the need for a buffer in Action 2, i.e., the selection of the alternative with no buffer (Alternative 2) as the preferred alternative, but is insufficient such that a buffer is required in Action 4, i.e., where the preferred alternative has the greatest buffer, 50 percent.

  EPA recommends the FEIS should better clarify and explain the need and lack of need for the buffers.

  EPA recommends the FEIS should better explain how Action 1 serves to meet the need for the proposed fishery management plan Amendment 18A.

- Action 7 – it would appear the establishment of the proposed accountability measurement modifications: prohibition of subsequent purchase/sale after a set annual catch limit has been met could potentially have discard and fish mortality implications, which are not discussed in the DEIS.

  EPA recommends the FEIS should discuss the discard and mortality implications for each of the Action 7 alternatives.

  EPA recommends the FEIS identify the preferred alternative for this proposed Action as the DEIS does not.

Confusing and Inconsistent Statements

- For Action 1, the DEIS appears to indicates the No Action Alternative **will not allow harvest** to increase as the stock improves, which makes it the most biologically preferable alternative among the alternatives being considered.

  However, the DEIS statement "*Alternative 1 (No Action) could result in unnecessary discards of black sea **bass if harvest can increase** while still allowing the stock to rebuild to BMSY by 2016,*" appears to be inconsistent with the above statement indicating this alternative will not allow harvest to increase as the stock improves, see p. 83.

  EPA recommends the final EIS (FEIS) clarify this inconsistency where it occurs throughout the DEIS.

  Additionally, the above statement regarding *unnecessary discards* is confusing as according to the DEIS release mortality is known to be very low: 1% for the pots and 7 percent for the hook/line fishing methods which appear to be the only legal methods for BSB fishing.

  EPA recommends the FEIS further explain unnecessary discards as used for this Alternative analysis.

- The DEIS states: *Under a constant catch strategy ...., the ACL would likely be reached sooner when the stock starts to rebuild..*

  EPA recommends the FEIS clarify the above assumption the ACL will likely be reached sooner when the stock starts to rebuild and briefly in 1 or 2 sentences explain how the ACLs work in existing BSB fishery management plan.

Incomplete Alternatives and Cumulative Effects Analyses

- The DEIS's NEPA analysis appears insufficient because it evaluates the 12 proposed actions in isolation of each other when the DEIS is proposing to implement all of these actions. Because actions when implemented in tandem with other actions could have direct, indirect, and cumulative environmental and economical impacts, these impacts should be addressed.

  EPA recommends those actions likely to be implemented and have cumulative effects, e.g., actions 1, 2, 5, 6, 7, 8, 9, and 10 and their corresponding alternatives be compared and discussed as if they as a group comprise an alternative. For example the implementation of the preferred alternative identified for each of these actions would constitute one alternative, the preferred (e.g., Action 1a.Alternative #2 + Action 1b.Alternative #2 + Action 1c.Alternative #1 + Action 1d.Alternative # 4 +Action

2.Alternative #2 + Action 5.Alternative #5 + Action 6.Alternative #2 + Action 7.no preferred alternative identified + Action 8.no preferred alternative identified + Action 9.Alternative #5 + Action 10.no preferred alternative identified). And the various cumulative actions alternatives should be comparatively analyzed.

- A number of Actions do not have their preferred alternative identified: Actions 4, 7, 8, and 10. Moreover, the DEIS implies the possibility for Action 8 not to be implemented as it has been considered in previous actions but not implemented. Does the failure to identify a preferred alternative indicative these Actions are not preferred and will not be implemented?

  EPA recommends the FEIS identify the preferred alternatives or identify whether these actions will be implemented.

- The DEIS proposes 12 actions and 8 actions (1, 2, 5, 6, 7, 8, 9, and 10) all appear to potentially have a cumulative effect upon the BSB fishery, its environment, ecosystem and affected fishermen. For the most part, the DEIS limits the analysis by analyzing the impacts of each action in isolation of each other. Moreover, the cumulative impacts section is more focused on the cumulative effects of past fishery management actions (e.g., Amendments 13C, 15 A & B, 16, 17B, etc.,) and potential future fishery management actions.

BSB Lifestyle Characteristics appear to be insufficiently considered in the Need Statement and Action Alternative Analyses

- The DEIS makes various generalized comments in its Action alternative analysis.
  - For example, the "*Beneficial biological effects include a more rapid rebuilding of the stock and increase in the average age and size structure compared to the other alternatives. ... Also, older and larger females have greater reproductive potential because fecundity increases exponentially with size. Therefore, there is greater potential to more rapidly increase the number of young each year (recruitment) under Alternative 1 (No Action).*
  - *Environmental factors such as weather, currents, and water temperature may affect the survival of eggs and larvae, causing poor recruitment even when large numbers of offspring are produced. Thus, alternatives, which allow the population to more rapidly attain a greater number of older, larger fishes in the population, also provides additional protections against recruitment failure due to several years of poor environmental conditions for eggs and larvae, creating a more robust population. Delaying rebuilding could make stocks more susceptible to adverse environmental conditions that might affect recruitment success, or to unanticipated errors in parameter estimates, which could result in excessive fishing.* See p. 85
- These statements are generic, not fact specific to the BSB. For example Action 10 discusses proposed alternatives to increase the minimum size limit, which according

to the DEIS *would theoretically decrease the rate of harvest by reducing the number of legal size fish able to be harvested. However, minimum size limits can have detrimental effects on fish stocks if they do not protect the older year classes. Recruitment problems can occur in a fishery that has fewer age classes than an un-fished population. Additionally, minimum size limits can encourage the harvest of older, larger fish, which have the greatest reproductive potential. … The age and size at 50% maturity for female black sea bass is 7" total length and 1 year, respectively. Black sea bass are 3 years old when they reach a size of 10" total length.*

EPA recommends the FEIS discussion be specific to the fish it is proposing to manage.

- For example, the proposed Action Alternatives should discuss the implications upon the BSB life cycle of being a protogynous hermaphroditic species: beginning its life as a female and maturing within 2 - 5 years into a male. It is possible the size limit increases could reduce the available male populations available for mating. The DEIS does not discuss this characteristic. Additionally, according to NOAA's data[4] the southern BSB fecundity data indicate an aged "two" fish (female) could range from 108 mm (4.25 inches) – 438 mm (17 inches).
- Additionally, NOAA's BSB studies indicate both the age and size of fish undergoing sexual transition has decreased as a result of increasing fishing pressure. And the frequency of large males has also declined and the reproductive potential of the BSB may be limited by the availability of large males.[5]

- The DEIS does not address why the BSB despite its resiliency-to-fishing-pressure type characteristics: relatively fast growth - maturing in less than 5 years, short-lived, high fecundity, protogynous hermaphroditism, it has continually been listed in an "overfished" status prior to the 2011 SEDAR25 stock assessment and currently has not attained a *rebuilt* status.

EPA recommends the FEIS discussion include a discussion of the limitations of how BSB productivity responds to exploitation as traditional fishery models generally developed for gonochoristic (remain the same gender throughout the lifecycle) species may not be particularly applicable to protogynous hermaphroditic species.[6]

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[4] *Essential Fish Habitat Source Document: Black sea bass, Centropristis striata, Life History and Habitat, Characteristics* see: http://www.nefsc.noaa.gov/nefsc/publications/tm/tm200/tm200.pdf

[5] *Essential Fish Habitat Source Document: Black sea bass, Centropristis striata, Life History and Habitat, Characteristics*

[6] Black Sea Bass 2009 Stock Assessment Update, see: http://nefsc.noaa.gov/nefsc/publications/crd/crd0916/crd0916.pdf

General Comments

- The DEIS is unclear regarding the differences to BSB fishery management between the weight limits (gutted and whole) associated with Action 1 and the proposed size limits in Action 10.

  EPA recommends the FEIS briefly clarify for the public understanding the differences in approaches to using weight versus size limits. NOAA's "Fish Watch" seems to have a good layman description of fishery management practices, e.g., biomass and landings, which could be incorporated succinctly to assist the public's comprehension of the proposed actions and their implications to the BSB fishery.

- The DEIS appears to define environmental consequences both vaguely and narrowly: solely in context of biological impacts to the fish of interest, the BSM, and possible endangered species, e.g., the right whale.

  EPA recommends the aquatic ecosystem impacts associated with the proposed actions be included, particularly for the preferred alternatives and any possible and likely mitigation opportunities be identified and considered in the FEIS.

- Action 3 – it appears from the DEIS, NOAA is establishing an appeals process to address those fishermen who believe they have been wrongly disqualified from the proposed endorsement program (Action 2) because NOAA (or other responsible federal/state entity) incorrectly calculated their logbook landings history.

  In the DEIS, neither of the two proposed appeal-process alternatives appear to provide the Regional Administrator (RA) with much discretion in deciding appeals because the RA's decision is limited to NMFS or state data. It appears the RA is given no ability to address potential credible errors in federal or state data. That lack of discretion may cause the appealing fishermen the perception the appeal process is rigged against them.

  EPA recommends a pre-appeal process be provided (or if one exists then discussed in context of this proposed action) for fishermen to resolve with the appropriate federal or state staff discrepancies between government and private data prior to issuing a final "endorsement."

  One possibility is to allow as part of the endorsement process, fishermen to submit an endorsement application with their data supporting their application. For those applications likely to be disqualified, an opportunity should be given to the fishermen to discuss with the appropriate federal/state staff why they are being disqualified. This opportunity may reduce the number of appeals made, should afterwards, the applicant remains unsatisfied with this process.

  EPA's perspective is giving affected public opportunity to be heard and allowed to question is an opportunity for technical assistance that benefits the agency in

the long run. EPA's success is dependent upon its regulated sectors' ability to achieve the nation's environmental protection goals. Consequently, EPA invests great effort toward technical assistance to its regulated sector.

While fishermen are not fishery scientists, they are interested in preserving their livelihoods. Helping them to understand why they are being burdened with more stringent regulations or being disqualified from a former fishery may assist NOAA in implementing the national goal of insuring fishing stocks for the future.

- It appears the proposed action may be implementing some actions taken by the Mid Atlantic Fishery Council, e.g., a coast-wide commercial quota divided among the states based on historic BSB landings.

  If so, **EPA recommends** the Mid Atlantic Fishery Council experience with these actions should be discussed as part of the actions' alternatives analysis including whether these actions helped address the identified need.

DEIS as Drafted is too Complicated and Complex for Comprehension

The DEIS as written is too complicated and complex for comprehension for the public. For example, the DEIS discusses the desirability of having a buffer between the ABC and the ACL as it would provide greater assurance that overfishing is prevented and the long-term average biomass is near or above B_{MSY}. The definition of B_{MSY} is the stock biomass expected to exist under equilibrium conditions when fishing at F_{OY}. F_{OY} is defined as the rate of fishing mortality expected to achieve OY under equilibrium conditions and a corresponding mass of B_{OY}. OY is defined as simply optimum yield whereas B_{OY} is defined as the stock biomass expected to exist under equilibrium conditions when fishing at F_{OY}. For a non-NOAA fishery scientist, all of this has no meaning. Moreover, F_{OY} appears to be used to define F_{OY} because it is part of the definition of B_{OY} and B_{OY} is used to define F_{OY}.

EPA recommends the FEIS be written for layperson, the average fisherman who is affected by these proposed actions. NEPA requires environmental information be made available to public officials and citizens before decisions are made and before actions are taken. If the public, particularly the affected fishermen, cannot read and understand the environmental information in the DEIS, then the relevant and applicable environmental information has not been made available to public officials and citizens consistent with NEPA's mandate.[7]

[7] 40 CFR § 1500.2 (b)

SUMMARY OF RATING DEFINITIONS AND FOLLOW UP ACTION [1]

Environmental Impact of the Action

LO-Lack of Objections
The EPA review has not identified any potential environmental impacts requiring substantive changes to the proposal. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposal.

EC-Environmental Concerns
The EPA review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impacts. EPA would like to work with the lead agency to reduce these impacts.

EO-Environmental Objections
The EPA review has identified significant environmental impacts that must be avoided in order to provide adequate protection for the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative). EPA intends to work with the lead agency to reduce these impacts.

EU-Environmentally Unsatisfactory
The EPA review has identified adverse environmental impacts that are of sufficient magnitude that they are unsatisfactory from the standpoint of public health or welfare or environmental quality. EPA intends to work with the lead agency to reduce these impacts. If the potential unsatisfactory impacts are not corrected at the final EIS sate, this proposal will be recommended for referral to the CEQ.

Adequacy of the Impact Statement

Category 1-Adequate
The EPA believes the draft EIS adequately sets forth the environmental impact(s) of the preferred alterative and those of the alternatives reasonably available to the project or action. No further analysis or data collecting is necessary, but the reviewer may suggest the addition of clarifying language or information.

Category 2-Insufficient Information
The draft EIS does not contain sufficient information for the EPA to fully assess the environmental impacts that should be avoided in order to fully protect the environment, or the EPA reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS, which could reduce the environmental impacts of the action. The identified additional information, data, analyses, or discussion should be included in the final EIS.

Category 3-Inadequate
EPA does not believe that the draft EIS adequately assesses potentially significant environmental impacts of the action, or the EPA reviewer has identified new, reasonably available alternatives that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant

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[1] From EPA Manual 1640 Policy and Procedures for the Review of the Federal Actions Impacting the Environment.